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Functionality, effectiveness and consultative effectiveness within the "spirit" of the International Tribunal of the Law of the Sea

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Abstract: This paper aims to shed light and investigate, according to the statute and the regulation of the International Tribunal for the Law of the Sea (ITLOS), on the consultative role that it can play after the International Court of Justice (ICJ) in resolving disputes that are part of the law of the sea. Is the consultative opinion possible and by whom? By states, by international organizations? What is its efficiency? What are the necessary requirements? The analysis follows with a comparative way with the jurisprudence of the ICJ. Our analysis also tries to regulate the consultative function of the judges of Hamburg.

Keywords: ITLOS; UNCLOS; ICJ; consultative function; Art.

183 regulation; statute of the ITLOS; principle of effectiveness.

Introduction

International disputes in the field of the law of the sea, through the jurisdiction of the ITLOS, are now a reality from the contentious point of view. However, the consultative function, as a competence of the ITLOS in full session, as provided by the relevant statute, is an evolving topic and perhaps unique in the field of international jurisdictions. The consultative competence is not used by the UNCLOS but only the limit of regulating the consultative function within the chamber of the international seabed[1].

The ITLOS has the competence within Art. 138 of the regulation and according to the relevant procedural conditions to act and use its exercise. The provision, thus, makes the advisory opinion in the legal framework, as provided by the international agreement, to be connected with the Convention on the Law of the Sea (Tanaka, 2014).

On 2 April 2015 we have a related request for an advisory opinion based on par. 2 of art. 138 and transmitted to ITLOS as a body that has authorised the related agreement. Par. 3 of art. 138 provides that the applicability of articles 130-137 of the

1We speak about Articles 159, par. 10, and 191 UNCLOS. See also from the International Seabed Chamber the opinion of 1 February 2011 relating to the case Responsibilities and obligations of states with respect to activities in the Area, ITLOS Reports, 2011, p. 10ss: https://www.itlos.org/index.php?id=109

regulation govern the advisory procedure before the Chamber of the International Seabed[2]. Art. 138 has taken up on various occasions according to the regulation (Yoo, 2008; Karagiannis, 2009; Ndiaye, 2010; Kateka, 2013) the related request of the Sub-Regional Commission for Fisheries, which was established in 1985, to arrive at an opinion for the first time having an advisory character[3].

The numerous declarations by states and international organizations[4], regarding the consultative competence of the ITLOS, was a matter of broad discretion. Questions continue to be open on the competence and the lack of compelling reasons to justify in a discretionary manner the denial of the opinion despite it being based on Art. 138 of the regulation of the ITLOS.

In the same spirit, is the request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal) of 12 December 2022 (Roland Holst,

2Art. 138 of the Regulation affirms that: "(…) 1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion; -2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal; -3. The Tribunal shall apply mutatis mutandis articles 130 to 137 (…)".

3Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), 2 April 2015.

4Declarations based on art. 133, par. 3 of the regulation. See also the orders of 24 May and 23 December 2013.

2022; Mayer, 2023)[5], with the relevant order of 30 June 2023[6]. The advisory opinion started after a letter was sent by the Commission of Small Island States on Climate Change and International Law (COSIS) to the ITLOS to formulate, according to Art. 2, par. 2 of the Agreement of the COSIS[7], which was concluded between some states such as Antigua, Barbuda, Tuvaly, Niue, Palau, Saint Lucia and Vanatu, an advisory opinion:

"(…) within the scope of the 1982 United Nations Convention of the Law of the Sea (…)" (Mayer, 2023).

In this case, the Tribunal was asked to take a position that weighs on the States Parties to the UNCLOS in the field of prevention, control, reduction of pollution of the marine environment. The effects that may cause in the field of prevention are related to the phenomena of greenhouse gases in the atmosphere, which are susceptible to climate change, through warming of the oceans, as well as acidification of the oceans, obligations of protection, preservation of the marine environment, which has to do with climate change.

Climate change is now a reality and a topic of intense interest. The possibility for a consultative function was also the subject

5Oral proceedings:https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_18_Rev.1_E.pdf

6https://www.itlos.org/fileadmin/itlos/documents/cases/31/C31_Order_2023_4_30_June_2023.pdf

7https://treaties.un.org/doc/Publication/UNTS/No%20Volume/56940/Part/I-56940-08000002805c2ace.pdf

of a proposal[8] within the UN and especially from the General Assembly to obtain an opinion from the ICJ. Thus, the ITLOS has regulated, according to Art. 138 of the regulation, the advisory opinion when it is foreseen by an international agreement, which is connected with the objectives of the UNCLOS, as a "whatever body" (Lando, 2016; Ruys, Soete, 2016) of an agreement, which in combination with Art. 21 of the statute, allows different agreements of the UNCLOS to confer the relevant jurisdiction on matters, which provide for the advisory competence that was attributed to it.

In particular, the COSIS agreement took into account the consultative jurisdiction that was sufficient stricto sensu to be applied to the UNCLOS and to favor the interpretation and application by the member states of the provisions, to which the obligations of the states protect the marine environment. Thus, the ITLOS excluded and limited the issues within an interpretative framework of application of the relevant agreement, which includes the consultative jurisdiction, as a possibility that rules on legal questions, as sufficient connection according to the objectives and interpretation of the international treaties (Hollis, 2020), which are part of the UNCLOS, after requesting an opinion of the COSIS. The ITLOS also puts the jurisdiction of the exclusive economic zone of the member states

8https://www.vanuatuicj.com/resolution

that are part of the subregional commission for fisheries:

"(…) to the international agreement attributing consultative competence that was applicable to such maritime spaces"[9].

Thus, the ITLOS has sought to clarify the obligations of states and illegal fishing activities, which do not declare the conducts within the exclusive zone of the UNCLOS. Moreover, the agreement COSIS attributes to the consultative competence within the scope of an application ratione loci with a precise and affirmative manner.

The choice to use the consultative power of the ITLOS is a delicate, political, sensitive topic, which shows that the reference to a jurisdictional body is necessary according to the exercise of a consultative function that takes into account the work of many states involved also requesting and evaluating effects that derive from its final opinion. Additionally, in this case, the consultative activity does not concern an interpretation consistent with the Charter of the UN as well as with the rules and regulations of the ITLOS.

The disputes that perhaps concern the objections of the competence of the Tribunal raise the political nature of the deferred question, which allows the ITLOS to also perform a function of interpretation, that relates to the normal exercise of its judicial attributions (Schermers, Blokker, 2011), as similar positions, that are assumed in cases that follow and pronounce

9Opinion of 2015: par. 69, 87, 154, 179.

according to the interpretation of the rules and regulations of the ITLOS.

Such use of advisory jurisdiction does not hinder the same rules as we have seen from the pronouncements of the ITLOS. Rules that regulate, control an operation that implicitly allow an application of a consultative procedure in relation to the contentious jurisdiction, in which the ITLOS believes that it carries out its work according to issues that involve and resort to the consultative function and the principle of contentious jurisdiction.

The discretionary power of a consultative and perhaps decisive opinion for a case is important through the activation of a procedure, which is difficult to conceive from a dispute, thus placing the arguments of the Tribunal to a system of solution of the disputes in the law of the sea. The prerequisites of a contentious jurisdiction require, in our opinion, the consultative function as a contentious jurisdiction that produces obligations, that respect the objectivity of an ascertainment of the law, a series of procedural guarantees, a method of evaluation, control that leads to the elaboration of an opinion, as a sentence within the scope of the consultative procedure.

The circumstances for each case certainly vary and above all the organic link that exists through the requests for consultation is authoritative and has a definitive character of a binding nature

accepting and/or rejecting motivations, which attribute to the requesting body to detect the considerations and legal evaluations, which are carried out, developed to resolve a dispute under a procedure of a consultative nature.

The consultative and ultra vires nature according to Art. 138 of the regulation of the ITLOS

The existence of a consultative jurisdiction within the ITLOS has been based on various arguments. It is important that international courts do not exercise the competence expressed and conferred by states in constitutive instruments. The contentious competence in practice applies after to the consultative one. The conventional references, which concern a consultative function in full composition show to lacking jurisdiction.

The limits of the exercise of a power, which regulates and recognizes international courts, are constitutive instruments based on rules and procedures that do not confer competences of a conventional nature (Thirlway, 2012; Liakopoulos, 2020)[10]. According to Art. 138 of the regulation, the ITLOS has acted

10See the dissenting opinion of judge Shahabuddeen in order of 28 February 1990 on Nicaragua's request for intervention in the matter relating to the land, island and maritime border (El Salvador v. Honduras), I.C.J. Reports, 1990, p. 47: "(…) Court, it may be said, has a certain autonomy in the exercise of its rule-making competence; but autonomy is not omnipotence, and that competence is not unbounded. Rules of Court could only be made in exercise of powers granted by the Statute, whether expressly or impliedly (…)".

ultra vires and outside the limits imposed by Art. 16 of the statute, that allows the rule-making power[11]. Thus, Art. 138 of the regulation does not constitute a relative legal basis having a consultative character.

The existence of a jurisdiction has as its argument to identify, according to Art. 21 of the statute, the tribunal that includes above all matters that confer the jurisdiction of the same ITLOS. Matters that have powers and include advisory opinions[12]. Art. 21 of the statute has not attributed a jurisdiction that limits and allows other types of agreements that can confer some matters, that are precise and provided for in the same agreements. According to par. 58 of article 21:

"the "other agreements" conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal (…)".

Art. 138 of the regulation remains immune and is aimed at the indication of prerequisites that are necessary for the exercise of a function attributed by the same statute.

The consultative competence is exhausted in the interpretation of Art. 21 of the statute, according to the terms of matters. The solution is not convincing and seems to be unsuitable to

11Order of 2023, parr. 19-26: "(…) considers that risks arise from a small group of States being 20 able to request ITLOS advisory opinions through a treaty of restricted membership 21 devised for that principal purpose. This is all the more so when the questions posed 22 concern the obligations of all States Parties to UNCLOS. To use the words of Judge Cot in SRFC, there are "dangers of abuse and manipulation" in future cases. These are dangers that are not protected against by article 21 of the Statute, 25 article 138 of the Rules or the Tribunal's approach to its advisory jurisdiction in 26 SRFC (…)".

12See from the order the par. 56.

overcome the relevant objections that call and admit the provisions that are attributed to a consultative competence from an interpretative point of view (Lauterpacht, 1958)[13].

The ITLOS has taken into consideration the interpretative purposes and the normative context, according to Art. 21, for the preparatory works of the statute. The ITLOS has referred to the compelling reasons, which are linked with the jurisprudential history of the ICJ, which recognize the existence of reasons, that are intense, such as an adhesion in toto to the character of second-line aid to a consultative function, which is understood in a way that develops the international jurisdiction.

However, unlike the ICJ, the ITLOS is not bound by organic constraints of an international organization. The ITLOS also takes into consideration the Inter American Court of Human Rights[14], since there, too, the notion of compelling reasons is progressively adjusted to the appropriate circumstances that motivate the denial of the relevant opinion. This has to do with the protection of the functioning of the human rights protection system in the inter-American context, which recognizes the consultative competence and evaluates the judicial propriety by

13Lauterpacht affirms that: "(…) nothing should be done which creates the impression that the Court, in an excess of zeal, has assumed jurisdiction where none has been conferred upon it (…)".

14La institución del asilo y su reconocimiento como derecho humano en el Sistema interamericano de protección (interpretación y alcance de los artículos 5, 22.7 y 22.8, en relación con el artículo 1.1 de la Convención americana sobre derechos humanos), advisory opinion OC-25718 of 30 May 2018, parr. 29-31: https://www.corteidh.or.cr/docs/opiniones/seriea_25_esp.pdf

attributing a decisive weight of cooperative profile that recognizes the consultative function to protect a regional system in a similar way.

The ITLOS does not include the use of power with a consultative function, thus taking the opportunity to motivate in a suitable way and justify the denial of reasons for propriety regardless of the application in each case in a different way. The ITLOS should show a decisive, definitive, precise character, susceptible to the application of the procedure.

The COSIS agreement does not conflict with any related motivation and reasons, which allow to protect the integrity of a judicial function, which involves the failure to adopt a requested opinion. Thus, the reformulation of a request for an opinion is valorized in a complementary way, where the consultative procedure is reformulated and delimited to a space, which is part of the agreement signed according to the obligations, which are incumbent on the member states that are part.

From an interpretative point of view, we must take into account, as we have predicted, Art. 288, par. 2 of the UNCLOS, which has laid the foundations of contentious jurisdiction[15]. The ITLOS has excluded the statute and the convention as an equivalent level. Art. 21 of the statute, which is intended in Art.

15According to art. 288, par. 2: "(…) any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement (…)".

288, par. 2 of the convention, i.e. par. 52, notes that the autonomy of the statute includes consultative jurisdiction that respects that of a conventional nature (Sohn, 1999).

The formalism following from the ITLOS and according to the rules is translated into a statement, which precludes the contextual interpretation and the relationship that has, according to Art. 31, par. 2 of the Vienna Convention on the Law of the Treaties (VCLT), with the statute and the law of the sea (Yoo, 2008; Hollis, 2020)[16].

The ITLOS concerns the interpretation of Art. 21 according to Art. 36, par. 1 of the Statute of the International Court of Justice (ICJ) with reference to matters and clarifications that are limited to the contentious jurisdiction of the court. Thus, the ITLOS, according to the framework of precautionary measures, as we already know from the Mox Plant case, has excluded the term that attributes the same meaning (Karaman, 2012)[17].

The interpretation of the identical terms is different and leads to different results that are relevant to the order, which states that:

"(…) regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and preparatory works (…)" (Liakopoulos, 2021).

Art. 21 of the statute took into account Art. 36 of the statute of the ICJ, as a justification in the matter of interpretation of

16According to Yoo: "(…) the differences between the two provisions should not be exaggerated (…).

17Mox Plant case (Ireland v. United Kingdom), counter-memorial of the United Kingdom of 9 January 2003, par. 53. See also the Replay of Ireland vol. I, 7 March 2003, par. 4.2.

treaties and as a report of agreements admitting the rule cited from Art. 31, par. 2 VCLT. As contextual interpretation is meant the influence that it could have in the statute of the court, which exercised the drafting of the statute of the ITLOS according to Art. 21 (Yoo, 2008).

The ITLOS has avoided that the preparatory works of the statute have ignored the methodological approach. The order in the Mox Plant case refers to the rule of interpretation of Art. 31 VCLT given the ambiguity of the matters according to Art. 21 of the statute[18]. Its negative outcome as a basis for consultative competence refers to the competence of Art. 21[19].

Judge Cot stated that:

"(…) the ambiguity of the provision (…) does not confirm the interpretation of the Tribunal (...)[20] a different interpretative approach (…) would have been more appropriate in order to support the jurisdiction of the Tribunal (…) the relative content (…) is based on arguments widely supported in various venues and, on the other hand, because the weakness of such arguments constitutes further proof of the fact that the consultative jurisdiction (…) does not enjoy, to date, a solid legal basis (…) to note (...) that some provision of the Convention does not interdit the exercise of a consultative jurisdiction by the Tribunal (...)"[21].

18According to judge Lucky, par. 23: "(…) the travaux préparatoires of UNCLOS or Annex VI because the literal or ordinary meaning of the language of the articles is clear and unambiguous (…)".

19ICJ, ruling of 12 November 1991 relating to the matter of the Arbitration Ruling of 31 July 1989 (Guinea-Bissau v. Senegal), I.C.J. Reports, 1991, par. 51ss. UNRIAA, vol. XIX, par. 93: "(…) si le littoral concernè est aisèment dèfinissable, il n'en est pas de même de la zone à considèrer, c'est-à-dire de l'ensemble de l'espace maritime qu'affectera la dèlimitation à opèrer par le tribunal. Une dèlimitation visant à obtenir un rèsultat èquitable ne peut ignorer les autres dèlimitation sdèkà effectuèes ou à effectuer dans la règion (…)".

20According to judge Cot in order of 2015, par. 3 Cot: "(…) l'ambigüité de la disposition saute aux yeux (…)".

21According to judge Cot, op. cit., par. 4.

The same consensual basis for the international jurisdictional function in principle has not provided for the institutional instruments[22]. International organisations apply the principle, which specialises and identifies the jurisdictions within the limits attributed by the institutional instruments according to the limits that have excluded the relative instruments (Kolb, 2001)[23]. Such type of arguments (Jesus, 2008)[24] do not preclude the relative function. In a general way the instruments, that are constitutive with a deficient way, reconstruct an implicit power, where it is evident and emerges from the consultative competence, without finding the relative confirmation (Amerasingh, 2013). In the 2015 opinion the ITLOS has distanced itself from the relative observations in this regard. The consultative competence has implied that the states have contested the competence of the ITLOS[25].

Judge Cot notes that the ITLOS's arguments are directly justified according to the measures, which eliminate the limits to the use

22Request fro an advisory opinion submitted by tghe sub-regional fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal) ITLOS/PV.14/C21/2, p. 14ss: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/verbatims/ITLOS_PV14_C21_2_Rev.1_E.pdf

23ICJ, Sud Est of Africa, (Ehtiopia v. South Africa; Liberia v. Sourth Africa), second fase, sentence of 8 July 1966, ICJ, Reports 1966, p. 6 ss., p. 25: the scope of application concerning the states which regulates residual freedom and everything that is prohibited and lawful.

24See also the written declarations from Germany, para. 8, and New Zealand, par. 8.

25ITLOS/PV.14/C21/3, p. 4: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/verbatims/ITLOS_PV14_C21_3_Rev.1_E.pdf

of the effective principle, which is expressed ut res magis valeat quam pereat[26]. Various elements mean that the ITLOS has implicitly resorted to the relevant interpretation of the matters. According to Art. 21 of the statute[27] the evaluation of another term relating to the principle of effectiveness is sufficient for the consultative competence of an international tribunal. Evaluating the elements, which have an interpretative basis[28], especially of a contextual nature, means awareness, that expressly provides for consultative competence, as a primary type through a consolidated practice. The exceptions to the principle of consent deduce a competence, which explicitly attributes in the chamber of international seabed. An agreement cannot exclude the interpretation of the term. In fact, according to judge Cot it

26Interpretation of peace treaties concluded with Bulgaria, Hungary and Romania, in ICJ Reports, March 30, 1950, par. 72. Legal consequences of building a wall in the occupied Palestinian territories, ICJ Reports of 9 July 2004, par. 44: "(…) cannot justify the Court in attributing to the provisions (...) a meaning which (…) would be contrary to their letter and spirit (…)".

27See par. 56 of the order: "(...) words all "matters" (...) should not be interpreted as covering only "disputes", for, if that were to be the case, article 21 of the Statute would simply have used the word "disputes". Consequently, it must mean something more than only "disputes". That something more must include advisory opinions (…)". see also the dissenting opinion of judge Lucky, par. 14. see the written declaration of 27 November 2013 of the Caribbean Regional Fisheries Mechanism (para. 55) and in the plaidoirie carried out by Bekker on behalf of the same organization in the public session of 5 September 2014 (ITLOS/PV.14/C21/4, p. 3).

28See also in argument the dissenting opinions of judge: Owada, and Simma, Abraham, Donoghue in the relevant sentene of: Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), judgment, preliminary exceptions, 1 April 2011, ICJ Reports 2011, par. 22 par. 22: "(...) all-determinative as the Court would appear to treat it in the present case; it does not suffice by itself. The fact is that "effectiveness" is merely one argument which may point towards a particular interpretation, but it does not obviate the need to take into consideration other elements relevant to elucidating the meaning of the text (…)".

cannot effectively guide the intentions of the relevant contracting states (Fitzmaurice, 1971; Thirlway, 2013)[29].

The reactions of states, which come into force from the regulation of 1997, appear to be weak. According to Art. 138 of the regulation, the procedure has led to the adoption of norms that are applied according to treaty law. This is a qualification where the absence of terms in subsequent practice, according to art. 31, par. 3, lett. b) of the VCLT, consists in a conduct of the states, which apply the relevant treaty. By asking and taking into account Art. 45, lett. b) VCLT it is assumed that the acquiescence used by the states respects the validity of Art. 138 of the regulation (Odendah, 2012). The norm, thus, shows the conditions that challenge the validity of the states (Liakopoulos, 2020; Liakopoulos, 2022)[30].

The relevant observations in the subsequent conduct are also valid as criticism that establishes the consultative competence of the ITLOS. They are considered positive by numerous states and international forums that thus demonstrate their competence.

29Thirlway affirms that: "(...) principle of effectiveness should be employed as an aid to assessment of likely intentions, rather than as a rigid canon of interpretation whereby the text must be deemed to be effective in all circumstances (…)". Fitzmaurice affrims that: "(...) free play, would result in parties finding themselves saddled with obligations they never intended to enter into, in relation to situations they never contemplated, and which often they could not even have anticipated (…)".

30See the dissenting opinion of Judge Fitzmaurice in case: Temple of Preah Vihear (Cambogia v. Thailand), ICJ Reports, 2013, parr. 281, 296, 62: "(...) acquiescence can operate as a preclusion or estoppel in certain cases, for instance where silence, on an occasion where there was a duty or need to speak or act, implies agreement, or a waiver of rights, and can be regarded as a representation to that effect (…)".

This reconstruction is very perplexing and configures the relevant conduct as a practice in relation to the application of a statute and a convention, thus, integrating as an interpretative modus the acquiescence that respects the validity of Art. 138 of the regulation (Yoo, 2008; Ndiaye, 2010)[31].

Perhaps this is a consensual solution since the jurisdiction of:

"(…) international courts and tribunals is based upon the consensus of the parties concerned. There is no reason to deny them to establish an additional jurisdiction (Wolfrum, 2013) (…). It seems to neglect the institutional and permanent nature of the Tribunal by moving from an exclusively "arbitral" perspective (…). It is clear (…) with respect to any additional jurisdiction attributed by means of an external agreement. It is necessary that the states parties to the instruments establishing the jurisdictional body consent (…) is found in Art. 21 of the statute (as well as in art. 288, paragraph 2, of the Convention), the scope of application of which, unlike what was claimed by the Tribunal in the 2015 opinion, appears however limited to contentious jurisdiction (…)".

The arbitral nature has found its basis in the statements of the judge Ndiaye where he stated that:

"(…) support for the idea that, where the parties agree, even an arbitral tribunal could give advisory opinions, this function being attributable to the jurisdictional role of the body seized (Ndiaye, 2010)[32] (…) critical

31According to Yoo: "(...) can be argued that a positive view of the "creeping" jurisdiction of the ITLOS is emerging, which can be seen as the "subsequent practice" as provided for in Article 31(3) of the Vienna Convention on the Law of Treaties (…)". Ndiaye in par. 29 affirms that: "(...) a general movement in favour of the advisory jurisdiction of the Tribunal (…)". And the Great Britain affirms that: "(…) were de lege ferenda, not de lege lata, and have not commanded sufficient support that they have been incorporated into an international agreement-or even for one to be proposed (…)".

32Judge Ndiaye reported the relevant agreement between France and United States of 27 March 1946 on air services and between Italy and United States of 6 February 1946 regarding: "(…) an advisory report to a tribunal of three arbitrators (…)". In particular the judge has affirmed the importance of the competence of the treaty and declared that: "(...) the agreement path as a basis for conferring advisory jurisdiction to the Tribunal is a more effective route than seeking a legal basis that does not exist in the Convention or the Statute (…)". See also from the order of 2023: "(…) the COSIS Agreement entered into force with the signatures of Antigua and

considerations raised against the "consensual solution" (…) despite the scarce relevance of the practice (Larsen, 1967)[33] (…), that an arbitral tribunal can be called upon by the parties to give an advisory opinion for the purposes of resolving a dispute. This perspective does not take into account the fact that the Maritime Tribunal is in any case part of an institutional and regulatory framework in which the mere consent of the parties involved, in the absence of a statutory and/or conventional basis, would not be sufficient for the purposes of attributing a new jurisdiction (…)" (Thirlway, 2013).

The consultative competence of the ITLOS has not found a basis in the statute observing that the legal basis for such competence is susceptible at present according to the validity of Art. 138 of the regulation and the validity of the opinion. Art. 138 has adopted ultra vires from the ITLOS the violation of the provisions that come from the statute as among other things observes the exercise of the same power of regulation. Thus, the practice as non-existent (Thirlway, 2013) considers that the rule that regulates the ultra vires does not presume the conformity of conventional instruments (Kolb, 2013), as results from the relative invalidity[34]. This circumstance remains to be devoid of

Barbuda and Tuvalu on 31 October 2021 (see article 4(2) providing that "[t]his Agreement shall enter into force upon signature by two or more states"). Membership of COSIS now also includes Palau, Niue, Vanuatu, St Lucia, St Vincent and the Grenadines, St Kitts and Nevis, and the Bahamas (…)".

33See the decisions rendered in the cases of the Interpretation of the Air Transport Services Agreement between the United States and Italy (December 22, 1963, Reports of International Arbitral Awards, vol. XVI, p. 5ss) and the Interpretation of the Agreement on air transportation services between the United States and France (July 17, 1965) p. 75ss). Larsen affirms that: "(…) parties expected and got a decision is confirmed by the fact that (…) neither party has claimed that the award was only advice. An arbitral decision was rendered and it is therefore incorrect for the Tribunal to style its opinion "advisory" (…)".

34See the dissenting opinion of judge Fitzmaurice of 21 June 1971 in case: Legal consequences for the states of the continued presence of South Africa in Namibia (South-West Africa) despite resolution 276 (1970) of the Security Council, consultative opinion of 27 June 1971, in ICJ Reports, 1971, 310: "(...) Court has no power to make Rules that conflict with its Statute: hence any rule that did so conflict

substantial consequences and the mechanisms are bound for a judicial ascertainment of the invalidity (Cannizzaro, Palchetti, 2011).

This situation appears to be problematic and the validity of an act such as a regulatory provision of the same jurisdictional body can have the power to control[35]. So we limit ourselves to asking Art. 138 of the regulation for the solution, in which the initiative of the states that tries to contest the validity of the relative norm is evident. Thus, the relative amendment of a statute is also promoted, which tries to exclude the consultative competence of the ITLOS. It is, in other words, an easy solution. It is not surprising that it is up to the states, given the incompetence of the ITLOS, of a relative modification of the statute. Thus trying for the ITLOS not to exercise the foreseen competence according to art. 138.

The ultra vires character of Art. 138 allows the validity of opinions that have to do with competence. The effect that is invalid and determined in the exercise, in which the jurisdictional function is founded, is part of the hypotheses of excess of power (Oellers-Frahm, 2019) and clashes with the principle of "compétence de la compétence" (Lauterpacht, 1928;

would be pro tanto invalid, and the Statute would prevail (…)".

35See the first written declaration of Great Britain, par. 35: "(…) the Tribunal fell into error in adopting article 138 of the Rules, that the Tribunal should hold that the article is ultra vires, and that accordingly the Tribunal has no jurisdiction to provide the requested advisory opinion (…)".

Shihata, 1965; Boisson de Chazournes, 2010).

The application of this principle aims to include the jurisdictional powers that implicitly confer the organ. It is evident that the alternative remedies of the competence are positive judgments related to a competence that includes in an unresolved manner the relative problem of invalidity of the provision in the absence of a legal basis. The consequences of the relative lack that has to do with the competence makes possible the reactions of the states that do not know the authoritativeness and the reliability of the dispute. So it is a scenario, which respects the validity of the lack of jurisdiction. In this case the states can react against an opinion of a non-binding nature and where the jurisdictional body does not find the terms of authoritativeness as a benefit.

There are no subsequent reactions, which lead the ITLOS to a consultative opinion that proceeds and shows favourability to a reform of conventional instruments, and regulate the consultative function[36]. This is a requirement, where the competence of a legal basis of a conventional nature[37] requires filling the gaps, through the formulation of Art. 138 of the regulation.

36See the written declarations of China (par. 64ss.) and Argentina (par. 31).

37See the dissenting opinion of judge Lucky, par. 28 in relation of art. 21 of the statute that affirmed: "(...) the avoidance of doubt in future requests for advisory opinions (…) article 21 should be amended to clear up any questions of jurisdiction (…)".

Ultra vires consequences of art. 138

It does not seem easy to fill the gaps of the statute of the ITLOS regarding the work of an advisory opinion[38]. The regulation, thus, shows that a procedure provided by international tribunals and especially by the ICJ to a centralized system, authorized by an opinion based on a convention and/or the statute[39], requires the access of the advisory procedure allowed by the same states. Art. 138 of the regulation confers to the advisory function agreements that are external and limited to requirements of an essential nature to integrate and delimit the competence. The requirements, thus, are part of a legal issue, according to which the object of the application and the external agreement are connected with the objectives of the convention that express the relative conferral of the competence of the ITLOS, as a competent body that authorizes in a decentralized way the advisory procedure. The external problem, consequently, attributes the relative competence. The ITLOS limits the agreement[40] related to the purposes of the Convention. The

38Judge Cot in par. 13 as a dissenting opinion declared that: "(...) sentiment d'une occasion ratée. Le Tribunal a fait un coup d'éclat en affirmant sa compétence consultative sur la base d'un raison- nement peu convaincant. Mais il aurait pu faire preuve d'imagination et construire un système cohérent, garantissant les droits des justiciables de la communauté internationale (…)".

39In the advisory opinion of 1 February 2012 relating to Sentence no. 2867 of the Administrative Tribunal of the International Labor Organization on the appeal lodged against the International Fund for Agricultural Development, I.C.J. Reports, 2012, p. 20, par. 22: "(…) art. 96, par. 2, of the Charter attributes to the General Assembly of the United Nations a gatekeeping role (…) the Assemblée générale se voit confier le rôle de gardienne de l'accès à la Cour (…)".

40This is the Convention on the determination of minimum conditions for access

reference to the Convention by certain provisions of the preamble to that agreement[41] has as a general criterion the assessment of the requirement of connection with the purposes of the Convention.

The objectives of the Convention already generically recall that the connection requirement according to Art. 138 of the regulation must satisfy the relevant reference of the UNCLOS, as it is contained in every external agreement. The requirement, in this case, contains a risk, as interpreted by Art. 288, par. 2 of the Convention. The consultative competence is, thus, integrated as a means of external agreements and as a prerequisite that refers to the regulated and substantial agreements relating to the law of the sea (Noyes, 2009). This is an important aspect, according to which the existence of a connection is evident in an agreement that regulates issues that are related to the law of the sea. The assessment and existence of the legal question, which is the subject of the question, according to the consultative practice of the ICJ, has been reported by the ITLOS[42]. It concerns the profiles that are definitive as can be seen in the case of Western Sahara:

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to and exploitation of marine resources within the maritime areas under the jurisdiction of the member states of the Sub-Regional Fisheries Commission where the art. 33 provided that the consultative procedure before the court affirms in par. 62 that: "(…) Conference of Ministers of the SRFC shall authorize the Permanent Secretary of the SRFC to seize the International Tribunal for the Law of the Sea on a specific legal matter for its advisory opinion (...)".

41Art. 63 of the order.

42Artt. 44-46 of the order.

"(...) legal are the questions which by their very nature (…) susceptible of a reply based on law (…) framed in terms of law and raising problems of international law (...)"[43].

The definition of the legal question is changeable and has as its objective both the interpretative criteria that delimit ratione materiae the consultative competence of the ITLOS as well as the general orientations that are discretionary due to the consultative competence of Art. 138 of the regulation. The ITLOS has adopted and moved from art. 21 the additional competence that also includes:

"(…) matters specifically provided for in any other agreement (…) there would be no reason to interpret the referred provision in a restrictive manner (…) must be traceable to the material scope of the external agreement (…) verify the traceability to the objective scope of the external agreement (…) adopted the criterion - evoked by the International Court of Justice in the opinion on the Lawfulness of the use of nuclear weapons in armed conflict[44]- of the so-called sufficient connection between the questions raised in the request and the purposes and principles of the external agreement attributing the competence (…)"[45].

The reasonable plan of the states participating in a decentralized procedure is connected with the relative access to the procedure, which implies the limitation of the extension of the jurisdiction, where the issues are related to the application of an external

43See the order of 16 October 1975, I.C.J. Reports, 1975, p. 18, par. 15. The opinion of 22 July 2010 on the conformity with international law of the unilateral declaration of independence by the Provisional Authority of Kosovo, I.C.J. Reports, 2010, p. 414, par. 25.

44ICJ, Sud Est of Africa, (Ehtiopia v. South Africa; Liberia v. Sourth Africa), second fase, sentence of 8 July 1966, op. cit., 77, par. 22. ICJ, opinion requested by the Assembly of the World Health Organization having not found the existence of the requirement referred to in the art. 96 of the United Nations Charter, pursuant to which the other specialized bodies and institutes authorized by the United Nations General Assembly: "(…) may also request advisory opinions of the Court on legal questions arising within the scope of their activities (…)".

45Artt. 67-69 of the order.

agreement, which attributes the acceptance as a criterion, which is elaborated by the ICJ. The jurisdiction ratione materiae has neglected Art. 21 of the statute. Art. 288, par. 2 of the convention has limited the contentious jurisdiction to disputes which concerned:

"(…) interpretation or application of an international agreement (…) in accordance with the agreement (…) regardless of the correctness or otherwise of the interpretative approach followed, the recourse to the flexible criterion of sufficient connection (…)".

It seems that the risk is invested, from the marginal point of view, to the law of the sea and the criteria, to which the connection and the purposes of the convention and the sufficient connection emerges as a problem, fall to the states that are not part of the external agreement. The criterion of sufficient connection has granted questions that imply the interpretation of agreements. In this case, the UNCLOS[46] turns out to be a circumstance that can affect any opinion. However, it has no binding nature with respect to obligations from third states. Thus, the participation of a proceeding according to written and oral declarations is a proceeding[47], in which the states not parties

46According to the written declarations of the United States in parr. 33-37: "(...) several states complained about the fact that in the technical note following the request for an opinion (p. 6) the requesting body had referred to a series of instruments, both binding and non-binding, in light of which the Court could have provided indications regarding the extent of the rights and obligations covered by the request for an opinion. Among the binding instruments, the requesting body has indicated, among other things, the Port State Measures Agreement of 22 November 2009 whose subjective scope of application is broader than the external agreement conferring jurisdiction on the Court (...)".

47See the written declarations of Argentina, par. 17: "(...) jurisdiction stemming from those circumstances is necessarily restricted ratione materiae to the matters regulated by that particular agreement and ratione personae to the requesting

to an external agreement find themselves involved in a consultative proceeding that have as their object the interpretation of a treaty that considers as possible and does not contemplate the possibility that the same states are contracting parties and that activate the consultative procedure (Chandrasekhara, Rao, 2002).

The reference to a request for an advisory opinion provides autonomous jurisdictional mechanisms of interpretation. The related provisions of a conventional nature have as a consequence the risk of considering the activation of a procedure of an advisory nature as decentralized, which recommends a cautious approach that is decisive and within the objective scope of the related competence.

External agreements and consultative competence

Defining the competence ratione materiae together with the criterion of sufficient connection means counterbalancing the recognition of the relative considerations of judicial propriety, to which the ITLOS has resorted to justify the decision of a final opinion. The discretion finds its foundation in the same Art. 138 of the regulation[48]. The approach that is followed by the ITLOS in the order does not seem to be held by the relative peculiarities

international organization and-possibly-to the states parties to such "international agreement" (…)".

48See art. 138 which is affirmed that: "(…) may give an advisory opinion (…)".

and criticalities that are characterized by a consultative procedure.

According to the discretionary power of the ITLOS, which rejects the objections of inadmissibility, the relevant jurisprudence of the ICJ establishes a discretionary nature, which does not include in the opinion a principle that takes into account the compelling reasons, thus justifying the relative denial[49]. The ITLOS, controlling the objections of the states, according to which the opportunity of an advisory opinion is largely concerned with a lack of clarity of the questions, exceeds the consent of third states. The ITLOS argued, in this regard, that the related questions are sufficient and precise for the purposes of a ruling, stating that:

"(…) well settled that an advisory opinion may be given "on any legal question, abstract or otherwise"[50] (…) on the exception of "generality" of the questions, an exception which seems to reflect precisely the same critical issues that emerged in relation to the delimitation of the objective scope of the jurisdiction based on the criterion of sufficient connection (…) reinterpretation or reformulation in a restrictive sense of such questions could have at least contributed to easing the aforementioned critical issues (...)"[51].

As a ground for refusal that is related to the lack of consent of

49See the Opinion of the International Court of Justice on the Lawfulness of the Threat or Use of Nuclear Weapons, I.C.J. Reports, 1996, p. 235, par. 14.

50See par. 72 of the order which the ITLOS used the opinion of 29 May 1948 on the Conditions for the admission of a State as a member of the United Nations (art. 4 of the Charter), I.C.J. Reports, 1948, p. 61

51See the written declarations of Japan, par. 18: "(…) may interpret or further reformulate the questions put to it in light of the regional character of the SRFC and the MCA Convention, if it considers necessary (…)". And the written declarations of New Zeland, par. 20: "(...) posed may need to be interpreted so that the legal questions can be properly answered. In some cases, this may require the scope of the questions to be narrowed in the interest of greater precision and in the light of the context within which the request has been submitted (…)".

third states, the ITLOS with problematic and decentralized way to the advisory mechanism limits itself to an orientation that is general and constituted by the ICJ. The lack of consent to third states and the advisory proceedings according to the objectives of competence assume relevance according to the terms of judicial propriety, with the advisory ruling determining the principle, with which states are not obliged to put a jurisdictional body of disputes that allow it[52]. In particular, the request for an advisory opinion as also stated by the ITLOS: "does not arise in this advisory proceeding". This is a consensus of third states, which refer to the reasons elaborated by the ICJ thus recalling the interpretation of the peace treaties[53], where it was stated that:

"(...) advisory opinion as such has no binding force and is given only to the [Sub-Regional Fisheries Commission], which considers it to be desirable "in order to obtain enlightenment as to the course of action it should take (…)"[54].

Activating the procedure based on provisions that are part of external agreements does not make the respect and consent of third states irrelevant regardless of a dispute, to which the competence ratione materiae of the ITLOS is limited according to the criterion of the sufficient connection[55]. The ITLOS as a

52Opinion of 15 December 1989 on the applicability of the section. 22 of the art. VI of the Convention on the Privileges and Immunities of the United Nations, I.C.J. Reports, 1989, p. 190, paragraphs 37 and 38.

53Opinion of 30 March 1950 on the Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania (first phase), I.C.J. Reports, 1950, p. 71.

54Par. 76 of the order.

55See the written declarations of United States, par. 32: "(…) consent remains important here, albeit in a different context. States negotiating and concluding an international agreement must be able to exercise their sovereign discretion to permit,

unitary and original element seeks to decentralize the activation of the relative procedure. It defines the consultative procedure that respects what is also valid for the ICJ. It is not excluded for states that can access such a procedure as well as for international organizations. The identification of the subjects that are authorized requires the opinion of Art. 138, par. 2 of the regulation.

The term body is susceptible and indicates, that the organ of the international organization as a state and/or as a group of states contests, from the conventional point of view, the role of the authorized person (Yoo, 2008). The activation of a consultative procedure is reserved to international organizations (Kateka, 2013). The ICJ[56] is contrasted and extended to the mechanism of states. These positions end up as a configuration of a procedure, in which the instrument that is available to international organizations[57] results as an alternative to a contentious

or not permit, a court or tribunal to render advisory judgments concerning the interpretation or application of that agreement. Where States decide to not establish an advisory function under a particular agreement, that decision is deserving of respect (…)".

56The opinion of 22 July 2010 on the conformity with international law of the unilateral declaration of independence by the Provisional Authority of Kosovo, op. cit., par. 33: "(…) advisory jurisdiction is not a form of judicial recourse for States but the means by which the General Assembly and the Security Council (...) may obtain the Court's opinion in order to assist them in their activities (…)".

57Opinion of 30 March 1950 on the Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania (first phase), op. cit., par. 71: "(...) Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an "organ of the United Nations", represents its participation in the activities of the Organization (…)". Opinion of the International Court of Justice on the Lawfulness of the Threat or Use of Nuclear Weapons, op. cit., par. 15: "(...) advisory function is not to settle-at least directly-disputes between States, but to offer

procedure where states directly appeal (Aljaghoob, 2006)[58].

The connection between the identification of authorized subjects and the criteria for establishing the risk of the principle of the consent of the states is an eventuality, in which the states can directly access the procedure of Art. 138 of the regulation, thus, imposing the approach of a risk assessment, where the object of the opinion constitutes the dispute between states. The danger of a precise principle of the consent is high. It will have to respect the consultative function as exercised by the ICJ. The decentralization of an activation mechanism can also abuse and conclude ad hoc agreements to ask for an opinion to the court, according to which the legal question concerns a dispute with a third state. The formulation of Art. 138 of the regulation in definitive normative parameters is questionable and risks favoring and/or determining circumstances that are analogous to

legal advice to the organs and institutions requesting the opinion (…)".

58Statement by Mr Rüdiger Wolfrum on the Report of the Tribunal at the Sixteenth Meeting of States Parties to the Convention on the Law of the Sea, 19 June 2006, para. 18: "(…) advisory function of the Tribunal may offer an alternative to contentious proceedings and could be an interesting option for those seeking a non-binding opinion on a legal question or an indication as to how a particular dispute may be resolved through direct negotiations (…)". Statement by H.E. Judge Shunji Yanai on Agenda Item 75 (a), "Oceans and the Law of the Sea" at the Plenary of the Sixty-Seventh Session of the United Nations General Assembly, 11 December 2012, para. 7: "(…) advisory opinions (...) can be an attractive option for States wishing to obtain an opinion on a point of law dividing them (…)". It is noted that the consultative procedure was not used continuously and its origin comes from international jurisdictions. Already since the League of Nations, alternatively, the contentious jurisdiction of the Permanent Court of the International Justice has used the expression arbitrage consultatif in the period where the cases where the states are served by the consultative procedure and refers to the Council of the League of Nations in the principle of East Karelia the disputes between them.

the refusal that is opposed by the PCIJ, as we have seen in the East Karelia case[59].

The PCIJ rejected the relevant opinion formulated by the Council. The issue directly concerned the main subject of a dispute between Russia and Finland which was not consensual.

In this case, the system of advisory opinion, according to Art. 138 of the regulation, was qualified as direct, accessible, decentralized. Its power makes the opinion to focus on the spirit of the ICJ without considering the advisory function of Art. 138, in which the ICJ stated that the PCIJ's denial in the East Karelia Statute together with the lack of consent from Russia and the incompetence on the part of the Council, it followed by seeking the opinion of Russia which at the time was not a party to the Statute of the Court as well as a member of the League of Nations.

States participating in the procedure, accessibility, discretion and consultative function

We have spoken of abuse of the consultative procedure of art. 138, as a precise, rigid, discretionary remedy according to the approach we have followed from the ICJ, thus ensuring compliance with a principle that allows the jurisdictional nature of a consultative function of the ITLOS (Liakopoulos, 2020)[60].

59See the order of 23 July 1923, P.C.I.J., Publications, Series B, No. 5, p. 7ss.

60ICJ, Western Sahara, advisory opinion, ICJ Reports, 1975, p. 25, parr. 32-33.

This approach is suitable and eludes the principle of consensus, where the ITLOS invests from a state and/or a group of states, an external agreement. The convention is an integral point of a main object, in which the dispute with a third state does not remain perplexed and in relation to the need for a jurisdictional character of a consultative function, according to which the ITLOS is approached according to Art. 138 of the regulation.

The ICJ has reiterated this function in contentious and consultative proceedings as the main objective of protecting the jurisdiction by qualifying the integrated system of the court as a guardian. Binding for the relevant requirements of its character[61] and a potential obstacle that protects the integrity of the jurisdictional function. These are characteristics of the procedure that are part of Art. 138 of the ITLOS. It is called by a state that pronounces in a consultative manner to a principal object of a dispute to a third state that concerns it in a marginal manner and that justifies the Tribunal as a legal trusted advisor rather than a simple tribunal[62].

61See from the ICJ the sentence of 2 December 1963: Cameroon v. United Kingdom, ICJ Reports, 1963, par. 29 and Frontier dispute (Burkina Faso v. Republic of Mali), in ICJ Reports, 22 December 1986, par. 45.

62Berman: "(...)court asked to play an advisory role is (…) faced with a choice. It may decide that the role requires it to bring to bear its collective judicial experience and wisdom, to be sure, but nevertheless not to act as a court; so it may conceive its function as analogous instead to that of a trusted advisor, like a family lawyer or the legal counsel of a government department or international organization. It may, on the contrary, decide that the advisory role is a judicial one, requiring it still to function as a court. This is what the International Court of Justice and its predecessor have consistently maintained in respect of their advisory jurisdiction (…)". Berman in another paper affirmed that: "(...) Tribunal se trouve dans la situation d'un conseiller

The jurisdictional function of a permanent tribunal charges the system of initiating the procedure that establishes external agreements and determines the uncertainties and nature of the consultative function, according to Art. 138 of the regulation. The consultative mechanism seeks to regulate various elements that are under discussion and investigation, while also leaving the drafting of Art. 138 of the tribunal to address any consultative proceedings.

There are many second thoughts about the objectives that the ITLOS intends to pursue in the area of consultative competence. This is a consultation of a preparatory nature. It formulates the procedural powers that preserve the effectiveness of a consultative function and reiterates the risks for a failure to resolve a question. This means that the consultative procedure constitutes and represents a possible opinion which brilliantly shows that the ITLOS works well in this area and can resolve a dispute in the area of the law of the sea.

juridique appelé à prodiguer ses conseils à un client, ce qui n'est guère compatible avec sa fonction judiciaire. Cette curieuse conception de l'absence d'effet juridique des avis juridiques mérite réflexion (…)".

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